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No. 00-1692

Supreme Court, U.S.
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In The

Supreme Court of the United States

WETLANDS ACTION NETWORK, *et al.*,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE THE SIERRA CLUB IN SUPPORT OF WETLANDS ACTION NETWORK'S AND CALIFORNIA PUBLIC INTEREST RESEARCH GROUP'S PETITION FOR A WRIT OF CERTIORARI

RICHARD R. WIEBE
Counsel of Record
2140 Ninth Avenue
San Francisco, CA 94116
Telephone: (415) 665-8793

Counsel for Amicus Curiae
The Sierra Club

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OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

(As stated in the Petition for Certiorari)

Whether the decision of the court of appeals upholding the Corps of Engineers' decision not to prepare an Environmental Impact Statement under the National Environmental Policy Act was erroneous because the court of appeals determined, contrary to decisions of this Court and other circuits, that the Corps did not need to consider, in making this determination, significant environmental impacts that will be caused by portions of the same project which are outside the Corps' regulatory jurisdiction.

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INTEREST OF AMICUS

Amicus the Sierra Club is a national nonprofit organization of approximately 600,000 members dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's ecosystems and resources; and to educating and enlisting humanity to protect and restore the quality of the natural and human environment. The Sierra Club's concerns encompass the protection and preservation of wetlands and other crucial habitats. The Sierra Club's concerns also extend to enforcement of the National Environmental Policy Act (NEPA) to ensure that the federal government properly considers all the foreseeable environmental consequences, direct and indirect, of its proposed actions.

The Club's particular interest in this case stems from the United States Court of Appeals for the Ninth Circuit's novel and unsupported restrictions on the scope of environmental scrutiny under NEPA. By holding that an agency need only consider those environmental consequences that are the direct result of the agency's actions, and not any that are the result of private actions made possible only by the agency action but outside its jurisdiction, the Ninth Circuit's new rule will cause many adverse but indirect environmental consequences of federal actions to escape review entirely. It will thereby thwart NEPA's goal of informed agency decisionmaking,

not only in wetlands cases but in many others categories of federal actions affecting the environment.[1]

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. NEPA And Its Implementing Regulations Require Federal Agencies To Examine Both The Direct And Indirect Environmental Consequences Of Their Actions

The National Environmental Policy Act of 1969 ("NEPA," 42 U.S.C. § 4321 et seq.) represented a monumental shift in the process of federal decisionmaking. It was the political recognition of a fundamental ecological reality: the natural systems of the Earth are interdependent and interconnected, and when our actions touch any part of that web of life they touch the whole. As Congress said in enacting NEPA, it was "recognizing the profound impact of man's activity on the interrelations of all components of the natural environment." 42 U.S.C. § 4331(a). NEPA instructs federal decisionmakers to take account of this ecological reality by examining the environmental consequences of their proposed actions before acting, rather than discovering those consequences only after

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[1] All parties have consented to amicus the Sierra Club's filing of this brief. Pursuant to Supreme Court Rule 37.6, the Sierra Club states: No person or entity other than amicus the Sierra Club, its members, and its counsel made any monetary contribution to the preparation or submission of the brief. Counsel for petitioners Wetlands Action Network and California Public Interest Research Group reviewed a draft version of this brief but did not author any portion of it.

they have occurred: "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To this end, NEPA requires federal agencies to examine and report on the "environmental impact" of proposed major federal actions. 42 U.S.C. § 4322(2)(C). The Council on Environmental Quality (CEQ) has issued regulations implementing this command. These regulations create a two-stage process for environmental analysis under NEPA. 40 C.F.R. § 1501.4.

First, the agency performs an initial environmental assessment (EA) to determine whether the possible environmental consequences of the proposed action are significant enough to justify a full-scale environmental impact statement (EIS). Depending on the results of the EA, either the agency goes on to prepare an EIS or, if the possible environmental consequences are so insubstantial that an EIS is not called for, it makes a "finding of no significant impact" ("FONSI"). In this way, "[t]he sweeping policy goals announced in . . . NEPA are thus realized through a set of action-forcing procedures that require that agencies take a hard look at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350 (internal quotation marks omitted). NEPA removes "the blinders to adverse environmental effects." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

Importantly, the CEQ regulations implementing NEPA instruct that in considering the environmental effects of its actions a federal agency must consider not only an action's direct effects but also any indirect or cumulative effects. 40 C.F.R. §§ 1508.7, 1508.8. The definitions of indirect and cumulative effects each encompass effects caused by actions taken by private parties. 40 C.F.R. § 1508.7 (cumulative effects included those flowing from other actions "regardless of what agency (Federal or non-Federal) or person undertakes such other actions"); 40 C.F.R. § 1508.8 ("Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.").

Inevitably, in applying NEPA and the CEQ regulations the question arises how proximate must a possible environmental consequence be to merit consideration either at the EA stage or at the EIS stage. Over the more than 30 years of NEPA's existence, federal agencies and courts have in the vast majority of instances used a practical and common-sense approach to answer this question. They have looked, as the CEQ regulations and the purpose of NEPA require, not only to the immediate and direct consequences of the proposed action but also to its indirect and cumulative consequences. Applying this requirement has commonly led agencies and courts to conclude that where private activities are not directly subject to federal regulation but nevertheless dependent upon and intertwined with the proposed federal action, the consequences of those private unregulated activities are indirect or secondary consequences of the federal

action and must be considered in order to gain a true and complete picture of the environmental consequences that will follow from the proposed federal action. *See, e.g., Fritiofson v. Alexander*, 772 F.2d 1225, 1245-49 (5th Cir. 1985) (Corps of Engineers violated NEPA in issuing wetlands destruction permit without considering cumulative impacts from other development projects); *Sierra Club v. Marsh*, 769 F.2d 868, 877-79 (1st Cir. 1985) (where proposed federal action was approval of a causeway and port facility on an island, NEPA required consideration of indirect environmental consequences of other, federally-unregulated private development that would likely occur on the island if causeway and port were built); *Davis v. Coleman*, 521 F.2d 661, 674-76 (9th Cir. 1975) (NEPA required consideration of environmental consequences of private development that would occur if highway interchange were built); *Friends of the Earth v. U.S. Army Corps of Engineers*, 109 F.Supp.2d 30, 40-42 (D.D.C. 2000) (Corps of Engineers violated NEPA in issuing permit for floating casinos without considering indirect and cumulative impacts of additional upland growth and development that presence of casinos would induce); *Alpine Lakes Protective Soc. v. U.S. Forest Service*, 838 F.Supp. 478, 482-483 (W.D. Wash. 1993) (Forest Service project to build road across national forest to making timber on private lands accessible for logging could only be properly evaluated under NEPA by considering environmental consequences of the private logging that the road would make possible); *accord, Robertson v. Methow Valley Citizens Council*, 490 U.S. at 339 (approving EIS that, "as required by Council on Environmental Quality (CEQ) regulations, *see* 40 CFR 1502.16(b) (1987), addressed 'off-site impacts that

each alternative might have on community facilities, socio-economic and other environmental conditions' ").

B. The Ninth Circuit Has Worked A Substantial Change To Existing NEPA Law In This Case By Creating A Novel "Regulatory Jurisdiction" Limitation To NEPA's Scope That Is Contrary To The Statute

Notwithstanding these requirements of NEPA, the Ninth Circuit ruled in this case that an agency's duty to scrutinize the environmental consequences of a proposed federal action is limited to only the direct and immediate consequences of the action. The developer here sought a permit under section 404 of the Clean Water Act (33 U.S.C. § 1344) from the Corps of Engineers to destroy wetlands in order to build Phase I of its mixed-use commercial and residential development project. The developer will destroy half the wetlands that are the subject of the permit in order to build a detention and treatment basin for polluted surface water runoff that will be created by its development of the uplands portion of the project. 8 AR 3728. Without the development of the uplands and the resulting creation of polluted runoff, there would be no reason or justification for filling the wetlands or creating the basin. The developer will destroy the other half of the wetlands in order to build the mixed-use development upon them; if the wetlands were preserved it would lose crucial linkages in its street grid system. 8 AR 3731. This destruction likewise is inextricably intertwined with the project as a whole, and will occur only because of the project.

Thus, destruction of the wetlands benefits the entire Phase I project and has no independent purpose or utility apart from serving the Phase I project, as the district court found and the Ninth Circuit affirmed. In the district court's words:

> The mixed-use development could not proceed in the manner it was planned without the filling of the wetlands as authorized under the Permit. . . . [T]he wetland fill would not be justified in the absence of the mixed-use development. . . . [¶] . . . [T]he entire project [is] functionally interdependent. The fill of wetlands as provided for under the Permit and the overall development . . . are inextricably intertwined . . . .

Pet. Cert. App. 64a-65a (opinion of the district court); *see also id.* at 21a ("The district court's determination that the project would not be able to proceed as planned without the permit and that the filling of the wetlands would not occur without the project is correct." [opinion of the Ninth Circuit]). Had the Corps denied the wetlands destruction permit, the developer would have had to change its plans significantly to preserve the wetlands and to deal with the polluted surface water runoff in some other fashion.

The Ninth Circuit ruled that, notwithstanding the benefits the wetlands destruction provides to the entire Phase I development, the Corps was not required to consider any environmental consequences of Phase I but only the direct consequences of the loss of the wetlands because only the wetlands were within the Corps' regulatory jurisdiction. On that basis, it upheld the Corps'

decision not to prepare an EIS, concluding that the direct effects of the wetlands loss alone were too insignificant to justify an EIS.

The narrow, straitjacketed approach of the Ninth Circuit in this case marks a major, unwarranted, and disastrous departure from the settled pattern of agency and judicial practice under NEPA. The Ninth Circuit ignored NEPA's command that federal agencies fully consider all the possible environmental consequences of a proposed action. Instead, it read into that broad mandate the unprecedented restriction that an agency need not consider any environmental consequence that does not directly stem from an action within the agency's jurisdiction.

As the Petition for Certiorari correctly explains in greater depth (at pp. 18-20), the Ninth Circuit's novel approach is an extreme and erroneous deviation from preexisting NEPA law. Nothing in NEPA, the CEQ regulations implementing it, or prior case law supports the notion that an agency's scrutiny need extend no further than the boundaries of its jurisdiction. To the contrary, those authorities all make clear that NEPA's environmental-consequences inquiry is a practical, real-world inquiry that focuses not on the formalities of agency jurisdictional boundaries but on the realities of how an agency's actions may possibly affect the environment, whether directly or indirectly through private actions linked to the agency's action.

The Ninth Circuit's error sprang from its conceptual confusion about the difference between a federal agency's regulatory jurisdiction and its much broader duty under

NEPA to examine the possible environmental consequences of its actions. The Ninth Circuit concluded that if the Corps were to consider the environmental consequences of all of Phase I of the development project it would somehow be asserting jurisdiction over all the activities of Phase I, jurisdiction which it lacks. (Pet. Cert. App. 22a-23a.)

The Ninth Circuit apparently reasoned backwards from the principle that an agency *must* consider the direct consequences of actions taken within its jurisdiction to the conclusion that an agency *cannot* consider any other consequences, including the consequences of private actions made possible by the agency's action but lying outside the agency's jurisdiction. This reasoning is, of course, fallacious. Although a federal agency must consider the direct environmental consequences of its actions, it does not follow that the agency is prohibited from looking at the indirect consequences of its action, including indirect consequences whose immediate cause is an action taken by a private party as a result of the agency action. Nor does it follow that simply by studying those indirect consequences the agency is asserting jurisdiction over them.

Here, for example, there is nothing inconsistent between the Corps' consideration of all the direct and indirect environmental consequences of Phase I of the developer's project, which has as a necessary and integral element the wetlands destruction the Corps has authorized, and a recognition that the Corps does not have jurisdiction over all the actions the developer proposes as

part of Phase I. Examining all the environmental consequences of Phase I – and not just the immediate consequences of the wetlands destruction – is not the equivalent of asserting jurisdiction over all the causes of those consequences.

More than just fallacious, the Ninth Circuit's reasoning is contrary to the commands of NEPA. NEPA was intended precisely to expand the field of vision of federal agencies to encompass all the environmental consequences of their actions, not just those consequences that are direct and immediate. NEPA draws no distinction, and it would be irrational to imply one, between direct consequences whose immediate cause is an action within an agency's jurisdiction and indirect consequences whose chain of causation includes not only the federal action but private actions taken in response to the federal action. A decision regarding the proposed action cannot be an informed one unless it fully considers both.

The novel approach taken by the Corps in this case and approved by the Ninth Circuit will have drastic adverse consequences, not only for thousands of wetlands in the vast expanse of the Ninth Circuit but also for a multitude of ecosystems nationwide if it is applied in other circuits and by other agencies. In many instances it will return us to the pre-NEPA world of federal decisionmaking, when decisionmakers routinely and myopically ignored any environmental consequences beyond the boundaries of the decision before them, no matter how certain it was that those consequences would flow from the decision.

C. Under The Ninth Circuit's Novel Approach, The Destruction Of Many Wetlands Will Escape Full Scrutiny Under NEPA

As this case demonstrates, under the Ninth Circuit's approach the destruction of wetlands in many instances will no longer trigger an EIS, no matter how great the adverse environmental consequences of the project for which they are being destroyed. Wetlands are some of the most diverse and productive habitats on Earth. They host rich communities of plants and animals. Wetlands-dependent species include not only those which spend their entire life-cycles in wetlands but also those dependent on wetlands for only a particular life stage or activity. Many species rely on wetlands as a juvenile nursery, as a breeding or nesting ground, as a hunting or foraging ground, or as a migratory or seasonal resting ground. U.S. FISH & WILDLIFE SERVICE, STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES 1986 TO 1997, at 10-11, 36 (2000) [hereafter WETLANDS STATUS AND TRENDS].

Wetlands are also one of the most extensively degraded categories of landforms in the nation. It is estimated that at the beginning of European settlement there were 221 million acres of wetlands in the area that became the 48 contiguous United States, and that at present only 105 million acres remain – less than half the original amount. WETLANDS STATUS AND TRENDS, 9. Some regions have suffered even greater wetlands losses: California, the state where this case originated, has lost over 90 per cent of its original wetlands. Zedler Decl., ¶ 2; SAVE SAN FRANCISCO BAY ASSOCIATION, PROTECTING LOCAL WETLANDS 1 (2000). Traditionally, wetlands abutting waterways have possessed great value for commercial and

industrial purposes, and many wetlands have been filled for these purposes. Boston, New York, Washington, Chicago, New Orleans, Seattle, San Francisco, and many of our other major cities and metropolitan areas contain large tracts of urbanized land that were once wetlands. Vast areas of wetlands have also been drained or filled for agricultural and silvicultural purposes. Much of this wetlands destruction was actively promoted by the federal government through the Swamp Land Acts (codified at 43 U.S.C. §§ 982-994), under which it transferred 65 million acres of public domain wetlands to the states, the majority of which was then drained and developed. U.S. DEPARTMENT OF THE INTERIOR, WETLANDS OF THE UNITED STATES – THEIR EXTENT AND THEIR VALUE TO WATERFOWL AND OTHER WILDLIFE (1956).

Given both the biological richness of wetlands and the large losses of wetlands habitat, it is not surprising that many of the species that are threatened or endangered are wetland-dependent. It is estimated that 43 per cent of all threatened and endangered species are dependent on wetlands. SAVE SAN FRANCISCO BAY ASSOCIATION, PROTECTING LOCAL WETLANDS 1 (2000). Of the 32 endangered species of the San Francisco Bay Area of California, for example, 23 depend on wetlands for critical habitat. *Id.* at 2.

As is true in this case, individual wetlands frequently are small in size and comprise a relatively small portion of the total area occupied by a development project. For example, the mean size of all non-forested freshwater wetlands in the United States is less than 8 acres, and the mean size of all forested freshwater wetlands in the United States is 21 acres. WETLANDS STATUS AND TRENDS, 33.

There are several reasons why this is so. First, localized hydrological and geological conditions often cause wetlands to exist in a dispersed and discontinuous state. Second, in many cases past development activities have destroyed some or most of the original wetlands at a particular location, leaving the remaining wetlands in a fragmented and reduced state. Third, wetlands often form a transitional interface between upland and deeper water habitats. This wetlands interface is often a relatively narrow band between larger areas of upland and deeper water.

Although wetlands often cover only a relatively small physical area, they are frequently hydrologically and biologically connected to the adjacent uplands. Because of these connections, actions modifying or destroying wetlands will often have ecological consequences extending beyond the boundaries of the wetlands themselves. In turn, development in the uplands can adversely affect both the wetlands on which the uplands border and the species that depend on the wetlands.

The Ninth Circuit's new rule will have a drastic effect on the scope of environmental scrutiny in cases where, as here, wetlands are to be destroyed as an integral part of a larger project. By limiting agency scrutiny to only those environmental effects occurring within the physical area subject to the agency's regulatory jurisdiction, the Ninth Circuit's rule will reimpose on federal agencies the blinders that NEPA was intended to remove. In wetlands permitting cases, this will cause the Corps of Engineers to limit its scrutiny, as it did here, to only those

environmental effects caused by the portion of the development occurring within the four corners of the affected wetlands. No matter how connected the wetlands development is with the development on the adjacent upland, the environmental consequences occurring from development outside the wetlands will be ignored. The result will be to severely circumscribe the EIS process, for when the environmental consequences of wetlands-destroying development projects are viewed through the narrow blinders crafted by the Ninth Circuit, many such projects will appear so benign that the Corps of Engineers will not require an EIS.

D. The Adverse Environmental Consequences Of Many Other Federal Actions Will Also Escape Full NEPA Scrutiny Under The Ninth Circuit's Approach

Wetlands permitting by the Corps of Engineers, however, is only one example of the many types of federal actions whose full environmental consequences will escape scrutiny under the Ninth Circuit's decision. Indeed, a moment's consideration reveals that many of the most significant environmental impacts of federal actions are indirect ones beyond the direct scope of federal regulation. For example, a completed federal highway by itself generates no air pollution. It is only the private, voluntary, and federally unregulated activity of driving on the highway that generates air pollution. Likewise, commercial and residential development made possible by a highway can be indirect but inevitable environmental consequences of its construction. That these effects are indirect, however, does not mean that

they are not causally connected to the federal action nor that they are too improbable or insubstantial to merit examination before the federal decisionmaker acts. *See, e.g., Davis v. Coleman*, 521 F.2d at 674-76.

CONCLUSION

The petition of Wetlands Action Network and California Public Research Interest Group for a writ of certiorari should be granted.

June 11, 2001

Respectfully submitted,

RICHARD R. WIEBE
Counsel of Record
2140 Ninth Avenue
San Francisco, CA 94116
Telephone: (415) 665-8793

Counsel for Amicus Curiae
The Sierra Club